U.S. Department of Labor

Assistant Secretary for Employment Standards
200 Constitution Avenue, N.W.
Washington, D.C. 20210

DATE: October 3, 1995
CASE NO. 89-OFC-31

IN THE MATTER OF

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPARTMENT OF LABOR,

PLAINTIFF,

v.

NORFOLK SOUTHERN CORPORATION AND NORFOLK & WESTERN RAILWAY COMPANY,

DEFENDANTS.

BEFORE: THE ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS

DECISION AND ORDER OF REMAND

This case arises under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (1988) and implementing regulations at 41 C.F.R. Part 60-741 (1988). The issue presented is whether a prior judgment against a charging party in a handicap discrimination proceeding before the Ohio Civil Rights Commission (OCRC), precludes the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) from litigating a Section 503 enforcement action involving (but not limited to) the same alleged discriminatee and employer who were subjects of the Ohio administrative action. This decision holds that OFCCP is not bound by the adverse OCRC decision and may proceed on the merits, provided that jurisdiction is first established.

BACKGROUND

OFCCP commenced this enforcement action by filing an administrative complaint against Defendant, Norfolk Southern Corporation, later amended to add as a party defendant "the named defendant's wholly-owned affiliate, Norfolk & Western Railway Company, the company by whom the individual complaint was actually employed." ALJ order granting motion to amend administrative complaint, Nov. 6, 1990. The amended complaint alleged that Norfolk & Western violated Section 503 of the Rehabilitation Act of 1973, as amended, and implementing regulations, by applying a physical job requirement, a 20/40 visual acuity standard, that screened out qualified handicapped individuals. Paragraph 7 of the complaint stated: Specifically, [defendants have] denied to reinstate [sic] to employment William Wilder, a qualified handicapped individual who requested reinstatement to his former position as yardmaster."

Wilder had also filed a charge of handicap discrimination against Norfolk & Western with the OCRC, which issued a Complaint and Notice of Hearing on May 27, 1988. On February 28, 1990, a hearing examiner for the OCRC issued Findings of Fact, Conclusions of Law, and Recommendation, which stated:

> 13. Therefore, I find that the Commission [through the Ohio Attorney General's Office] failed to establish a *prima facie* case because it failed to prove that Complainant could safely and substantially perform the essential duties of his job. In the alternative, assuming a *prima facie* case was established, Respondent proved Complainant's handicap created an occupational hazard, pursuant to Revised Code Section 4112.02(L)

RECOMMENDATION

> For all the foregoing reasons, it is recommended that the Commission issue an Order of Dismissal in Complaint #4855. *Id.* at 8. On August 23, 1990, the Executive Board of the OCRC issued its Findings of Fact, Conclusions of Law and Order, adverse to Wilder and concluding that "[t]he Commission has failed to prove by reliable, probative and substantial evidence that Respondent has discriminated against Complainant in violation of Section 4112.02(A) of the Revised Code" and that "Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof." *Id.* at 6-7. No such judicial review was obtained in the Ohio courts.

On April 19, 1991 the ALJ issued a Decision and Order Granting Motion for Summary Judgment and Recommending Dismissal of Complaint (R. D. and O.), which concluded:

> I find the proceeding before the OCRC to be similar in all material respects, with regard to the elements making up the parties' respective burdens of proof, to the course this proceeding would take if it went to hearing and a decision on the merits. I further find that in the OCRC proceeding, William Wilder was

adequately represented and the usual procedural safeguards to ensure him a full and fair hearing were in effect.

I further find that the OCRC proceeding, which involved a party with which OFCCP is in privity, collaterally estops OFCCP in the instant case and that under the precedents cited and discussed above, this proceeding, barred by collateral estoppel, should be terminated.

R. D. and O. at 9-10. This R. D. and O. is now before me for decision.

DISCUSSION

Although I disagree with and reverse the ALJ's collateral estoppel holding, this case cannot proceed on the merits regarding the alleged discrimination against Mr. Wilder, or the broader nondiscrimination/affirmative action policy and standards issues transcending Mr. Wilder's particular situation, in the absence of an ALJ determination that jurisdiction exists. Accordingly this case must be remanded to the ALJ for specific findings regarding subject matter jurisdiction over Mr. Wilder before his alleged discrimination can be litigated. If jurisdiction is not found to exist in the Wilder matter, OFCCP may still proceed on the separate nondiscrimination/affirmative action employment policy and standards issues,[1/] if jurisdiction is first established by the ALJ over these other matters.

During the relevant time period, Section 503 required government contractors and subcontractors "in employing persons to carry out [any contract in excess of $2,500] ... [to] take affirmative action to employ and advance in employment qualified individuals with handicaps." 29 U.S.C. § 793(a) (1988).[2/] As a result of *Washington Metropolitan Area Transit Authority v. DeArment,* (*WMATA),* 55 (CCH) Empl. Prac. Dec. ¶ 40,507 (D.D.C. 1991), and administrative decisions predicated on the *WMATA* decision, the working-on-the contract issue is jurisdictional and must be specifically addressed by the ALJ prior to proceeding to the merits. *OFCCP v. Texas Industries, Inc.*, Case No. 80-OFCCP-28, Asst. Sec. Dec. and Ord. of Rem., Jan. 27, 1995, and decisions cited, slip op. at 2-4. Jurisdiction cannot be presumed, even if it is not raised by the parties. *Texas Industries,* Case No. 80-OFCCP-28, slip at 3; *OFCCP v. United Airlines, Inc.,* Case No. 86-OFC-12, Asst. Sec. Dec. and Ord. of Rem., Dec. 22, 1994, slip at 3-5; *OFCCP v. Keebler Co.,* Case No. 87-OFC-20, Asst. Sec. Dec. and Ord. of Rem., Dec. 21, 1994, slip op. at

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[1/] OFCCP Administrative Complaint at 2-4; OFCCP brief and exceptions at 35-36, 46-50; *OFCCP v. Commonwealth Aluminum, formerly Martin-Marietta Aluminum of Kentucky, Inc.,* Case No. 82-OFC-6, Act. Asst. Sec. Fin. Dec. and Ord., Feb. 10, 1994, slip op. at 4-5, 11-23, 28-29; *OFCCP v. Yellow Freight Systems, Inc.*, Case No. 84-OFC-17, Act. Asst. Sec. Fin. Dec. and Ord. of Rem., July 27, 1993, slip op. at 16-17; *OFCCP v. Missouri Pacific Railroad*, Case No. 81-OFCCP-8, Dep. Und. Sec. Dec. and Ord., Aug. 12, 1985, slip op. at 1-3.

[2/] Pub. L. 102-569, § 505(a), 106 Stat. 4427 (1992), amended Section 503 by striking this quoted coverage or jurisdictional limitation. *See* 29 U.S.C. § 793(a) (Supp. IV 1992).

3-5; *OFCCP v. Yellow Freight Systems, Inc.,* Case No. 82-OFC-2, Act. Asst. Sec. Dec. and Ord. of Rem., Oct. 6, 1993, slip op. at 1-2; *OFCCP v. Yellow Freight Systems, Inc.,* Case No. 79-OFCCP-7, Spec. Asst. to Asst. Sec. Dec. and Ord. of Rem., Aug. 24, 1992, slip op. at 3-10.

Assuming that jurisdiction exists, this Section 503 action may proceed to litigation on the merits. I disagree with the ALJ's decision to dismiss any portion of this case on the basis of collateral estoppel. Clearly, the OCRC decision did not rule on the separate nondiscrimination/affirmative action employment policy and standards issues[3/] in OFCCP's enforcement action. OCRC Findings of Fact, Conclusions of Law and Order at 1, 6. Thus, even assuming that traditional collateral estoppel doctrines apply to Section 503 litigation vis-a-vis judicial decisions of state agencies involving the same complainant and employer (which I conclude to the contrary), any notion of collateral estoppel is inapplicable to the non-Wilder portion of this case. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 191 (3rd Cir. 1993); *Gergick v. Austin*, 997 F.2d 1237, 1239 (8th Cir. 1993).

I disagree with the ALJ's holding that collateral estoppel precludes litigation of Wilder's claim because of the adverse OCRC decision. The ALJ based this holding on an analysis of the Supreme Court's decision in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), for determining whether a judicial decision of a state administrative agency has preclusive effect on a subsequent Section 503 proceeding. R. D. and O. at 3. However, *Elliott's* general criteria[4/] for determining the extent, if any, to which the decision of a state agency should be accorded preclusive effect, *see* 478 U.S. at 799, come into play only if the federal tribunal has first determined that preclusion itself is consistent with Congressional intent. *Elliott*, 478 U.S. at 796. Thus, the Court held that "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims [under the Civil Rights Act of 1964, as amended]" but under the separate Reconstruction civil rights statutes, "Congress . . . did not intend to create an exception to the general rules of preclusion." *Elliott,* 478 U.S. at 796-97.

[3/] *See* n.1 and surrounding text.

[4/] The ALJ interpreted these criteria as follows:

> (1) Did the state agency act in a judicial capacity?
>
> 2) Did it resolve disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate? and
>
> 3) Would its findings be given preclusive effect in the state's court? (Elliott p. 799)

R. D. and O. at 3.

The Supreme Court's reference to general rules or criteria for determining the effects, if any, of prior state agency rulings was addressed solely to the Reconstruction statutes because it had already determined that preclusion was barred by statutory interpretation and intent under Title VII. *Elliott*, 478 U.S. at 796-99. Contrary to the Court's methodology and approach in *Elliott,* the ALJ did not first analyze and interpret Section 503 itself to determine whether it expressly or impliedly treated the OCRC's findings and conclusions as preclusive. *Elliott* 478 U.S. at 795-97. "[Defendants] point out that while the underlying statute, the Rehabilitation Act of 1973, is silent as to the preclusive effect of prior state administrative proceedings, the Supreme Court, in *University of Tennessee v. Elliott* . . . . has provided a three-part test for making such a determination." R. D. and O. at 3 (ALJ interpretation of "test" quoted in n.4).

The ALJ's failure to address the intent of the statute prior to applying criteria for determining the extent to which the OCRC's decision should be afforded preclusive effect is also inconsistent with the Supreme Court's decision in *Astoria Federal Savings and Loan Association v. Solimino,* 501 U.S. 104 (1991). The *Solimino* case was decided subsequent to the R. D. and O. and cited *Elliott* with approval. *Id.* at 110. The *Solimino* Court ruled that claimants under the federal Age Discrimination in Employment Act (ADA) of 1967, as amended, were not collaterally estopped from litigating in federal court the judicially unreviewed findings of a state agency with respect to an age discrimination claim. In holding that such findings had no preclusive effect on federal proceedings under the ADA, the Supreme Court stated: "[T]he question is not whether administrative estoppel is wise but whether it is intended by the legislature . . . . Thus, where a common-law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Solimino* 501 U.S. at 108 (citations omitted). Hence, I shall first address the preclusive effect of the OCRC decision, if any, as a matter of statutory interpretation of Section 503. *Kulavic v. Chicago & Illinois Midland Railway Co.,* 1 F.3d 507, 519-20 (7th Cir. 1993); *Brooks v. Sulphur Springs Valley Electric Cooperative,* 951 F.2d 1050, 1054-55 (9th Cir. 1991).

In interpreting Section 503, I am mindful that remedial statutes such as Section 503 should be interpreted liberally. *Atchison, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557, 561-62 (1987); *Hogar Agua y Vida En El Desierto v. Suarez-Medina*, 36 F.3d 177, 181 (1st Cir. 1994) ("We employ traditional tools of statutory interpretation, particularly the presumption that ambiguous language in a remedial statute is entitled to a generous construction consistent with its reformative mission."). Further, as the Supreme Court emphasized in *Solimino*: 501 U.S. at 108-12 (emphasis added).

> [The] interpretative presumption is not ... one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme . . . . The presumption here is thus properly accorded sway only upon legislative default, applying where Congress has failed expressly or *impliedly* to evince any intention on the issue . . . . Thus § 14(b) suffices to outweigh the *lenient presumption* in favor of administrative estoppel, a holding that also comports with the *broader scheme* of the Age Act and the provisions for its enforcement.

In accordance with the preceding judicial guidelines, I find that the language, legislative scheme and history of Section 503 overcome any "lenient presumption" in favor of estoppel. *Solimino,* 501 U.S. at 112. In enacting Section 503, Congress recognized that the Federal statute was "modest" as a matter of funding and coverage. *Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1276-77 (1st Cir. 1993). Further, the legislative history of the 1974 Rehabilitation Act Amendments reflects an "inten[tion] that sections 503 [applicable to Federal contractors] and 504 [applicable to Federal grantees] be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result." S. Rep. No. 93-1297, 1974 U.S. Code Cong. & Admin. News at 6391; *Ellenwood*, 984 F.2d at 1274-75; *Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1557-58 (11th Cir. 1983); *Fisher v. City of Tuscon,* 663 F.2d 861, 865-66 (9th Cir. 1981), *cert. denied,* 459 U.S. 881 (1982); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1241 (7th Cir. 1980). Both the 1973 and 1974 legislative history are relevant. *Chrysler Corp. v. Brown,* 441 U.S. 281, 298-302 (1979).

According estoppel effects to handicap discrimination decisions of state agencies acting under state laws would vitiate and be inconsistent with the Congressional policy for "a consistent, uniform and effective Federal approach to discrimination against handicapped persons" since estoppel would result in the forced Federal acceptance and recognition under Section 503 of separate and diverse standards of compliance, remedial relief, and crucial litigation matters, such as the establishment of a *prima facie* case and burden of proof.[5/] Hence, according estoppel effects to state agency decisions would "threaten the *uniformity* of the § 503 system," *Ellenwood,* 984 F.2d at 1276 (emphasis in original), and unnecessarily establish a further limitation on Section 503 beyond its statutory scope. Moreover, my interpretation of Section 503 "fits the remedial purpose of the Rehabilitation Act to 'promote and expand employment opportunities' for the handicapped. 29 U.S.C. § 701(8)." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984).[6/]

[5/] For example, the standards and burdens the OCRC hearing examiner applied under state law may be at variance with those which apply to Section 503. *Cf.* Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation at 5-8 with *OFCCP v. CSX Transportation Inc.,* Case No. 88-OFC-24, Asst. Sec. Dec. and Ord. of Rem., Oct. 13, 1994, slip op. at 16-21; *OFCCP v. Cissell Manufacturing Co.*, Case No. 87-OFC-26, Act. Asst. Sec. Fin. Dec. and Ord., Feb. 14, 1994, slip op. at 7-14; *OFCCP v. Commonwealth Aluminum,* Case No. 82-OFC-6, Act. Asst. Sec. Fin. Dec. and Ord., Feb. 10, 1994, slip op. at 9-11; *OFCCP v. Yellow Freight Systems, Inc.*, Case No. 84-OFC-17, Act. Asst. Sec. Fin. Dec. and Ord. of Rem., July 27, 1993, slip op. at 11-16.

[6/] The remedial purpose of the Rehabilitation Act is reflected in Section 503 as a matter of Federal procurement contracts and subcontracts. "[Section 503] was intended at the least to direct federal agencies to use their purchasing power so as to improve employment opportunities for 'qualified handicapped persons.'" *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079 (5th Cir. 1980), *cert. denied*, 449 U.S. 889 (1980).

In view of the Congressional policy that Sections 503 and 504 of the Rehabilitation Act be enforced in a consistent and effective manner, the decision of the United States District Court for the District of Columbia in *Daniels v. Barry*, 659 F.Supp. 999 (D.D.C. 1987), provides strong support for my holding.[7/] The court specifically held that an adverse judicial decision by the District of Columbia Office of Human Rights did not have preclusive effect on a police officer's subsequent claim under Section 504. *Daniels*, 659 F.Supp. at 1001-02. The court found that Section 504, "[f]or reasons that are clear in both the language of the Act itself as well as its legislative history," should be treated like Title VII of the Civil Rights Act of 1964, as amended, citing the Supreme Court's decision in *Elliott*. *Daniels,* 659 F.Supp. at 1001. *See Gonzalez v. Development Assistance Corp.*, 50 FEP Cases 1708, 1711 (D.D.C. 1989) (claims under Sections 503 and 504 of Rehabilitation Act not barred by prior arbitration decision). In sum, my holding is fully consistent with Supreme Court decisions involving this issue under Title VII of the Civil Rights Act of 1964, as amended, and the ADA, and the parallel decision of the United States District Court for the District of Columbia under the Rehabilitation Act itself.

Although the OCRC decision does not have a preclusive or binding effect in this proceeding as a matter of statutory interpretation of Section 503 itself, the R. D. and O. is also erroneous as a matter of traditional estoppel principles, absent my statutory interpretation. As previously discussed, the portion of this proceeding involving nondiscrimination/affirmative action employment policies, practices and procedures transcending Mr. Wilder's particular complaint and situation was not before the OCRC for adjudication. Therefore, the OCRC decision could not have a preclusive, collateral estoppel effect on that portion of this proceeding. Further, OFCCP was not a party, or in privity with Mr. Wilder or the OCRC in the state proceeding. *Solimino*, 501 U.S. at 107-08; *Elliott,* 478 U.S. at 796, 799. OFCCP did not appear before the OCRC as a named party to advocate any position, nor did it participate vicariously in the OCRC litigation by exercising control over the parties. *United States v. Mendoza*, 464 U.S. 154, 158-64 (1984); *Montana v. United States*, 440 U.S. 147, 153-64 (1979); *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 757-59 (lst Cir. 1994).

ORDER

This case is REMANDED to the ALJ for appropriate jurisdictional findings. The record may be enlarged or expanded accordingly (with the parties provided opportunity for necessary discovery), including the examination of all potential bases of jurisdiction or coverage without prior limitation or exclusion. If jurisdiction is found for the Wilder portion of this case, the ALJ shall proceed to the merits on that aspect of the case. If jurisdiction is not so found, the ALJ shall still proceed to the merits on the separate nondiscrimination/affirmative action matters also raised in the OFCCP complaint, if jurisdiction over these issues is found. In view of the age of this case, the parties are encouraged to reach a voluntary settlement short of further litigation. *OFCCP v. Keebler Co.*, Case No. 87-OFC-20, Asst. Sec. Dec. and Ord. of Rem., Dec. 21, 1994,

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[7/] Neither the ALJ's R. D. and O. nor the subsequent pleadings of the parties to the Assistant Secretary make any reference to the *Daniels* decision.

slip op. at 4-5 and cases cited. I note that the Office of Administrative Law Judges' Settlement Judge procedures are available for this purpose.

SO ORDERED.

Assistant Secretary for
Employment Standards

Washington, D.C.